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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE FLORIDA BAR,
Petitioner,
v.
G. STEWART MCHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* INSTITUTE FOR ACCESS TO LEGAL SERVICES, NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, STATION REPRESENTATIVES ASSOCIATION, INC., NATIONAL LAW FIRM MARKETING ASSOCIATION, YELLOW PAGES PUBLISHERS ASSOCIATION, TELEVISION BUREAU OF ADVERTISING IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici Curiae have a strong interest in the continued vitality of this Court's decision in *Bates v. State Bar of*

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

Arizona, 433 U.S. 350 (1977), and the long line of decisions that have followed from *Bates*. *Amici* are public interest groups, media groups, professional associations, and attorney groups committed to the constitutional protection of commercial speech and to attorney advertising as a means of providing broad access to legal services. Many have been involved in defending or disseminating attorney advertising.

The Institute for Access to Legal Services is a national organization formed by attorneys in 1989 to educate the public and professionals about the public benefits of attorney advertising and to fight attempts to re-regulate the right to advertise. The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit association that serves and represents nearly 5,000 radio stations, more than 950 television stations, and the major television networks, and seeks to preserve and enhance its members ability to disseminate information concerning commercial activities freely. The National Resource Center for Consumers of Legal Services is a non-profit research and educational organization committed to improving the delivery of legal servies, with a primary emphasis on legal services plans. The Association of National Advertisers, Inc., is exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis; its members account for almost 80 percent of the nation's annual national and regional advertising expenditures. The American Advertising Federation serves 50,000 members involved in creating, producing, buying, selling, placing, broadcasting, and publishing advertising. The American Association of Advertising Agencies represents more than 650 advertising agencies with more than 1,700 offices throughout the United States, which place 80 percent of all national advertisements and substantial portions of regional and local advertising. Station Representatives Association, Inc., represents the industry that, on behalf of radio stations, television stations, and cable systems, sells national and regional spot

advertising. The National Law Firm Marketing Association is a non-profit association representing more than 1,100 members involved in marketing for the legal profession. The Yellow Pages Publishers Association represents 191 publishers who publish more than 95 percent of all Yellow Pages directories, 156 certified marketing representatives who sell Yellow Pages advertising, and 76 suppliers to the Yellow Pages industry. The Television Bureau of Advertising was formed in 1954 to promote spot television advertising to potential advertisers on behalf of its more than 300 broadcast television station members.

Amici believe they can make a significant contribution to the Court's consideration of the nature and scope of First Amendment protection accorded to attorney advertising. *Amici* include groups that have commissioned and compiled national empirical studies of consumer attitudes toward attorneys and attorney advertising, and have participated in American Bar Association appraisals of attorney advertising. *Amici* can therefore provide a national perspective against which Petitioner's call to overrule *Bates* may be assessed.

INTRODUCTION AND SUMMARY OF ARGUMENT

For seventeen years, this Court has repeatedly held that the First Amendment protects professional advertising in general and attorney advertising in particular, and that restrictions premised on no more than an interest in preserving the "dignity" of the profession may not constitutionally be imposed. These decisions were based on the recognition that truthful commercial information "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). *Bates*, and the consistent line of subsequent decisions recognizing that the First Amendment confers

substantial protection for advertising by attorneys and other professionals, flows inexorably from this Court's recognition that commercial information is too valuable to be suppressed for inconsequential or speculative reasons. By asking the Court to overrule this entire line of decisions, the Florida Bar has undertaken a "heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis*" should "yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). The Bar has not met, and cannot meet, that burden here.[2]

The Florida Bar's call for the Court to repudiate seventeen years of precedent is *not* premised on *evidence* that First Amendment protection for attorney advertising has resulted in poor representation of clients, or in overreaching or other improper behavior by attorneys. The Florida Bar has asked this Court to reverse itself on the ground that the Bar would like its members to enjoy a better reputation. The Florida Bar does not dispute the importance or effectiveness of attorney advertising in facilitating access to legal services for low and moderate-income clients. Accordingly, the Bar is arguing that the prestige of lawyers is more important than broad access to legal services. The Court weighed and rejected that very argument in *Bates*. 433 U.S. at 368. Further, the argument rests entirely on the unproved and incorrect premise that attorney advertising is the sole or primary cause of negative attitudes toward attorneys, and if there were no advertising, the public would hold lawyers in high regard. That premise is squarely contradicted by empirical research, as will be demonstrated in Point II, *infra*.

Nothing presented by the Bar or its *amici* is sufficient to justify overruling *Bates*. Each of the four factors iden-

[2] *Amici Curiae* address only the first question presented for review by Petitioner: whether the Court should overrule *Bates v. State Bar of Arizona* and its progeny. *Amici* take no position on the constitutionality of the specific regulation at issue.

tified in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-09 (1992), for testing whether precedent should be overruled cuts against such a course. The application of the commercial speech doctrine to attorney advertising remains consistent with this Court's First Amendment jurisprudence. The factual underpinnings of *Bates* remain accurate and meaningful. Time has shown that attorney advertising informs the public generally about legal services and encourages a broader access to legal services than the traditional country club-type business development methods, but does not cause attorneys to act less professionally. The rules announced in *Bates* and its progeny have not proved unworkable as a practical matter. And there has been considerable commercial reliance on this Court's unbroken line of decisions upholding attorney advertising.

Therefore, *amici* urge this Court to reject the Florida Bar's invitation to cast aside the Court's long-settled understanding that states may not constitutionally ban truthful, non-misleading attorney advertising on the ground that it "tarnish[es] the dignified public image of the profession." *Bates*, 433 U.S. at 368.

ARGUMENT

Respect for precedent is indispensable because it "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez*, 474 U.S. at 265-66. For this reason, the Court is institutionally committed to stand by its decisions so long as "the understanding of the issue has not changed so fundamentally as to render the commitment obsolete." *Casey*, 112 S. Ct. at 2815.

The understanding of the issue of attorney advertising has not changed "fundamentally." It has not changed at all. The objections raised by the Florida Bar here were raised by the Arizona State Bar in *Bates*, and expressly rejected. *See Bates*, 433 U.S. at 368. The Court has consistently rejected the same or similar arguments in subsequent cases. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993). The principle of *stare decisis* thus has *particular* force here because the Florida Bar's arguments for overruling the Court's previous decisions are the same arguments raised—and rejected—repeatedly, consistently, and recently, in the very decisions challenged by Petitioner.

In *Casey*, this Court identified four "prudential and pragmatic considerations" for testing "the consistency of overruling a prior decision with the ideal of the rule of law." *Casey*, 112 S. Ct. at 2808. *Stare decisis* is less compelling where (1) "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; (2) "facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification"; (3) "the rule has proved to be intolerable simply in defying practical workability"; and (4) the rule is not

"subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Id.* at 2808-09. None of these considerations applies to *Bates* and its progeny. The rule of law, as well as the consumers *Bates* and subsequent decisions were intended to help, would thus be ill-served by overturning that body of jurisprudence.

I. THE RULE ANNOUNCED IN *BATES* HAS BEEN ELABORATED IN SUBSEQUENT DECISIONS AND IS ENTIRELY CONSISTENT WITH RELATED PRINCIPLES OF FIRST AMENDMENT DOCTRINE.

A. The *Bates* Rule Parallels The First Amendment Protection Accorded To Advertising By Other Professions And To Commercial Speech In General.

Far from being "a remnant of abandoned doctrine," *Casey*, 112 S. Ct. at 2808, the *Bates* rule is a cornerstone of a consistent and developed doctrine of commercial speech.[3] Indeed, last Term and the previous Term, this Court applied *Bates*'s reasoning to advertising by *other* licensed and regulated professionals. *See Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084 (1994) (prohibition against advertising accounting certifications invalidated); *Edenfield*, 113 S. Ct. 1792 (prohibition against in-person solicitation by CPA invalidated). Lower courts have applied the same prin-

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[3] *See In re R.M.J.*, 455 U.S. 191 (1982) (invalidating restrictions on attorneys' advertising their areas of practice, jurisdictions in which they are licensed, and their opening of a new office); *Zauderer*, 471 U.S. 626 (1985) (invalidating prohibitions against attorney advertisements using illustrations or targeting a specific legal problem); *Shapero*, 486 U.S. 466 (1988) (invalidating prohibition of targeted direct mail by attorneys); *Peel v. Attorney Registration & Disciplinary Comm'n*, 110 S. Ct. 2281 (1990) (invalidating prohibition against attorney advertising of nationally-recognized certification).

ciples to advertising by psychologists, dentists, physicians, and chiropractors.[4]

Moreover, this Court has not merely upheld *Bates*'s recognition that professional advertising is commercial speech protected by the First Amendment, it has revisited and reaffirmed the specific holdings challenged by the Florida Bar. The Florida Bar today, like the Arizona Bar in *Bates*, argues that attorney advertising threatens the public "image" of the profession. Pet. Br. at 6; 433 U.S. at 368. The Court's rejection of that argument in *Bates* was based on its skepticism that advertising alone would "diminish the attorney's reputation in the community," 433 U.S. at 369, and its conclusion that, *in any event*, consumers' interest in obtaining information about professional services far outweighs any risk that recognition of the commercial nature of professional services poses to the "dignified public image of the profession," *id.* at 368.

Eight years later, in *Zauderer*, 471 U.S. at 648, the Court again rejected the "dignity" argument, expressing doubt that "the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgement of their First Amendment rights," and holding that the possibility that some people might find the advertising offensive "cannot justify suppressing it." The Court rejected the same argument again three years later. *See Shapero*, 486 U.S. at 480. And, only two Terms ago, in *Edenfield*, the Court addressed and rejected the identical "dignity" argument applied to the profession of accounting. As it always has, the Court accorded the state's interest in ensuring ethical and responsible *behavior* by professionals full regard, but dismissed the Florida Board of Accountancy's claim that "the public perception of CPA independence will be undermined if CPAs behave like ordinary commercial actors." *Edenfield*, 113 S. Ct. at 1799-1800. Citing *Bates*, the Court rejected any state interest in hiding the commercial nature of professional services from the public, and scrutinized the restriction not in terms of its effect on the profession's "image" but solely in terms of its effect on the profession's behavior. *Id.* at 1800-04.

[4] *See, e.g., Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992) (psychologist advertising restriction invalidated); *Parker v. Kentucky Bd. of Dentistry*, 818 F.2d 504 (6th Cir. 1987) (prohibition against dentists advertising specialty invalidated); *Primary Care Physicians Group, P.C. v. Ledbetter*, 634 F. Supp. 78 (N.D. Ga. 1986) (physician advertising restriction invalidated); *Rosenburg v. Dep't of Professional Regulation*, 488 So. 2d 158 (Fla. App. 1986) (prohibition of chiropractor ads if "tasteless" invalidated).

B. The "Institutional" Decisions Relied On By Petitioner Are Not Analogous.

Aware that *Bates* is fully consistent with this Court's commercial speech jurisprudence, the Florida Bar's response is that attorney advertising should be evaluated in light of this Court's decisions on speech in public schools, government offices, prisons, and military bases. However, those cases provide *no* support for the types of restrictions on attorney advertising that existed before *Bates*.

The restrictions on speech in public schools, prisons, and military bases were upheld by this Court because the property where the speech occurred was owned by the government, and the government was permitted to ensure that its own property was not used in ways that interfered with the government's objectives. In the public school case on which the Bar relies most heavily, for example, the Court upheld the school's power to remove a story from a newspaper *owned* by the school, *financed* by the school, and *operated* by the school *as part of its curriculum*. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

The Court carefully inquired whether the newspaper, although owned by the school, had been operated as a public forum—in which case the school would have lost its ability to censor the contents. *Id.* at 268-70. There was no doubt that a student, off school premises, was free

to exercise the full range of First Amendment freedoms. *Id.* at 266. The question before the Court was whether the school had so dedicated its own property to public use that it had lost the ability to refuse to affirmatively promote *someone else's* speech. *Id.* at 270-71.[5]

The decisions in *Hazelwood et al.*, however, have no relevance to the restrictions that may constitutionally be imposed on an attorney in private practice who wishes to purchase space in a private advertising directory or time on a private broadcast station to reach potential clients in the private sector. The Florida Bar's attempt to work its way out of this dead end is to argue that lawyers play a role in the judicial branch of government and are therefore somehow transformed into government employees.

At most, that argument proves what has never been in dispute: governments may impose rules on how lawyers interact with the judiciary. Governments have long imposed rules on how lawyers may interact with the court system, including what they may say to or in a court. Furthermore, judges retain broad power to cite a lawyer for contempt, even if the sanctioned actions involve speech. But nothing at issue in this case, in *Bates*, or in any of the cases the Florida Bar wants overruled, involves such regulations.

Lawyers in private practice are not public employees, just as accountants who represent citizens before the Internal Revenue Service are not members of the executive branch, and citizens who testify before congressional committees are not members of the legislature. The method

[5] Prisons and military bases are likewise *owned* and *operated* by the government, and are not dedicated to public use. Unremarkably, this Court has found that the government has many of the same powers to control their use as would any private owner. Similarly, when the government undertakes a proprietary role, it enjoys some of the rights of a private employer in terms of demoting or firing an employee, including the power to fire an employee for speech that actually interferes with the agency's operations.

by which lawyers attract private clients does not affect the functioning of the court system in any way. Arguably, the filing of frivolous suits could affect the court system. But there is no intrinsic connection between advertising and frivolous suits, and the First Amendment does not preclude the government from prohibiting frivolous suits.

The "related principles of law" for *Bates* and its progeny are the principles this Court has consistently applied: the principles of the commercial speech doctrine, as developed in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Edenfield*, 113 S. Ct. 1792, and *Ibanez*, 114 S. Ct. 2084. And the development of the commercial speech doctrine since *Bates* has followed, solidified, and elaborated its analysis and decision. Thus, the first *Casey* factor weighs decidedly in favor of *stare decisis*.

II. THE FACTS UNDERLYING THIS COURT'S DECISIONS IN *BATES* AND ITS PROGENY ARE UNCHANGED.

A. *Bates*'s Finding That Attorney Advertising Can Provide Useful Information And Serve Important Social Needs Is Unchanged.

Bates premised its analysis not only on the general understanding that advertising is of value because it informs the public about the availability, nature, and price of services, *Bates*, 433 U.S. at 364, but also on the fact that the then-existing methods of attracting clients failed "to reach out and serve the [entire] community." *Id.* at 370. Citing studies showing that many who needed legal help were discouraged from obtaining it out of an exaggerated fear of the cost, or because of inexperience locating a competent attorney, the Court concluded that advertising "can provide some of the information that a

consumer needs to make an intelligent selection." *Id.* at 371.

Studies undertaken since *Bates* establish not only that the problems identified by the Court remain serious, but also that advertising appears to have ameliorated them. An American Bar Association ("ABA") study shows that, as recently as 1992, half of low and moderate-income households facing a legal problem did not recognize that they needed legal services or did not know how to obtain them. American Bar Association, *Findings of the Comprehensive Needs Study* (1994) ["*Comprehensive Needs Study*"]. ABA studies confined solely to low-income households demonstrate an even larger problem, but improvement since *Bates*. In the year *Bates* was decided, 90 per cent of low-income households facing a civil legal problem either did not realize it or did not know how to find a lawyer. American Bar Foundation, *The Legal Needs of the Public* (1977). Ten years after *Bates*, the number had dropped to 80 percent. American Bar Association, *Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and of the Public Generally* 4 (1989) ["*Two Nationwide Surveys*"].

Surveys across income levels also show there is greater access to legal services than before *Bates*. ABA-sponsored studies in 1974 and 1989 discovered that a higher percentage of adults used lawyers for personal legal needs (such as wills, home purchase, divorce, and consumer problems) 12 years after *Bates* than five years before. *Id.* at 63-65. Studies of specific areas of legal practice also demonstrate that since *Bates* a higher percentage of people who need legal representation are receiving it. For example, between 1977 and 1992, there was a 67 percent increase in the number of individuals involved in automobile accidents who were represented by attorneys in negotiating with insurance companies.[6] Statistics available

[6] Insurance Research Council, *Auto Injuries: Claiming Behavior and Its Impact on Insurance Costs* 44 (September 1994).

for the period between 1977 and 1987 suggest that accident victims are more likely to obtain compensation when represented by attorneys than when negotiating on their own. For example, the amount recovered from insurance companies for automobile accidents increased 140 percent in that period, with more than 80 percent of that compensation paid to claimants represented by counsel.[7] Indeed, it is the very success of attorney advertising in reaching injured people who might otherwise have not been represented in their negotiations with insurance companies that has led some commentators to claim that the "real enemies of lawyer advertising" are "insurance companies and the businesses causing injuries who d[o] not want to deal with lawyers representing injured people." [8]

Advertising plays an especially important role for low and moderate-income Americans. Members of these groups receive most of their information about legal rights, and about attorneys who are willing to help them, from advertising.[9] The *Comprehensive Needs Study* found that 21 percent of low-income households and 11 percent of moderate-income households who hired an attorney found the attorney through an advertisement. *Comprehensive Needs Study* at 28.[10]

[7] *See* All Industry Research Advisory Counsel Report, *Compensation for Automobile Injuries in the United States* (March 1989).

[8] "The Real Enemies of Lawyer Advertising," *Texas Lawyer* 20 (June 14, 1993).

[9] *See, e.g.*, Geoffrey C. Hazard, Jr., et al., *Why Lawyers Should Be Allowed To Advertise: A Market Analysis Of Legal Services*, 58 N.Y.U.L. Rev. 1084, 1096 (1983).

[10] A 1989 ABA survey found that 11 percent of adults under 34 years old from all income levels relied on advertisements to choose an attorney, while only 2 percent of adults 55 or over did so. The survey also found that 14 percent of households in the middle third of the income scale relied on advertisements to choose an attorney, but only 8 percent in the highest third of the income scale did so. *Two Nationwide Surveys* at 84-85.

Furthermore, there is strong evidence that attorney advertising not only provides information about legal services to lower-income households but also provides greater access by reducing fees. The Federal Trade Commission's 1984 study found that the types of civil legal services most likely to be needed by lower-income households cost 5 to 13 percent more in states with restrictive attorney advertising rules than in states with liberal rules.[11] Researchers and commentators have concluded that advertising tends to lower the cost of legal services because it facilitates comparison shopping; increases the overall demand for legal services, which enables practitioners to employ economies of scale; provides attorneys with a less expensive method of attracting clients, and increases competition by lowering entry barriers.[12]

Thus, "the facts of economic life" for lawyers and potential clients are *not* different from those previously assumed, and therefore do not "warrant[] the repudiation of the old law." *Casey*, 112 S. Ct. at 2812. Advertising remains a vital tool for providing broad access to legal services. Moreover, the Florida Bar has not proposed any alternative means of reaching out to the *entire* community.

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[11] *See* FTC, Cleveland Regional Office and Bureau of Economics, Report of the Staff to the FTC, "Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising" 77-117 (Nov. 1984). The study priced the cost of a simple will, a will with a trust provision, a personal bankruptcy, an uncontested divorce, and an automobile accident claim.

[12] *See, e.g.*, Terry Calvani, et al., *Attorney Advertising and Competition at the Bar*, 41 Vand. L. Rev. 761 (1988); Shroeter, Smith and Cox, *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, XXXVI J. Indus. Econ. 49 (1987); Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. Pa. L. Rev. 45 (1985); Cox, DeSerpa and Canby, *Consumer Information and the Pricing of Legal Services*, XXX J. Indus. Econ. 305 (1982); Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 Am. B. Found. Res. J. 179.

B. *Bates*'s Finding That Attorney Advertising Will Not Erode Actual Professionalism Is Unchanged And Unchallenged.

Bates was also premised on an assessment that permitting attorneys to advertise their services would not result in "the erosion of true professionalism." 433 U.S. at 368. The Florida Bar has not even challenged this factual underpinning. Nowhere does the Bar even suggest, much less prove, that attorney advertising has caused members of the bar to be less devoted to serving their clients and the public.

Instead, the Florida Bar's argument rests solely on its contention that the *prestige* of attorneys has diminished as a result of attorney advertising. As a basis for abandoning *stare decisis*, this has two critical weaknesses. First, the best evidence available makes clear it is untrue. Second, and more important, *Bates* would not be undermined even if the Florida Bar were factually correct.

1. *Empirical evidence.*

Recent national surveys confirm that the prestige of the legal profession is lower, at present, than many other professions; but they affirmatively do *not* confirm that attorney advertising is the cause. Indeed, when asked open-ended rather than suggestive questions—*e.g.*, why do you have a negative impression of attorneys, rather than whether advertising has contributed to your negative impression—most people explained that their opinions of the profession are based on personal experience with attorneys.

For example, a poll taken by the *National Law Journal* in 1993 found that fully 60 percent of respondents said they had a low opinion of lawyers, but 43 percent attributed their opinions—positive or negative—to past experience with lawyers. Another 24 percent said their opinions were based on news accounts; 10 percent named television shows; and 18 percent pointed to novels. Only 4 percent

said they thought the image of attorneys would be improved by eliminating attorney advertising. "National Law Journal/West Publishing Co. Poll Shows Public Has Diminishing Respect for Attorneys," *National Law Journal*, p. 1, col. 1 (Aug. 9, 1993) (poll of 815 random subjects) ["*NLJ Survey*"].

A 1994 study by Wiese Research Associates found a slightly more positive view of the profession as a whole—the mean rating was slightly more favorable than unfavorable—but the legal profession still rated lower than most other professions. Attorney Advertising/Perceptions Study 10-11 (April 1994) ["*Wiese Survey*"].[13] When respondents were asked why they had formed their opinions, the most common answer was negative personal experiences with lawyers. *Id.* at 19. Only two percent of those surveyed mentioned attorney advertising, when presented with this open-ended, rather than suggestive, question. *Id.* at 14-15. Even when asked how attorneys could improve their image—a question virtually inviting a public relations response—only six percent mentioned changing or eliminating attorney advertising. *Id.* at 18. The research group concluded "advertising does not appear to play a major role in consumers' image of the legal profession." *Id.*

A 1992 study by Peter D. Hart Research Associates Inc. of 1,202 adults for the ABA yielded similar results, leading the researchers to conclude that the more contact people have had with lawyers, the less favorable their impressions of the profession. *See* Gary Hengstler, "Vox Populi: The Public Perception of Lawyers: ABA Poll," ABA Journal 60, 61-62 (Sept. 1993) ["*1992 ABA Poll*"]. The strongest predictors of negative feelings were: having served on a jury and having been sued. *Id.* at

[13] The study was sponsored by the Yellow Pages Publishers Association for submission to the American Bar Association. The sample was random and resulted in 400 completed interviews.

62.[14] Similarly, the Rhode Island Bar's 1993-94 study found that consumers who had a negative impression of the profession in general said it was because lawyers did not return telephone calls, did not keep clients informed of the progress on their claims, did not adequately explain what documents were or why their clients were being asked to sign them. Rhode Island Bar, *Ad Hoc Committee on Lawyer Advertising Report* 4 (April 6, 1994). Attorney advertising was not even mentioned. *Id.*

Additional data from these studies suggest other factors that may play a role in the legal profession's reputation. For example, negative attitudes toward attorneys are not evenly distributed throughout income levels, races, ethnic backgrounds, or genders. Those who have traditionally been "have-nots" have far more favorable opinions of the legal profession than the "haves."

The 1992 ABA Poll discovered that African-Americans, Hispanics, low-income households, and women have more favorable opinions of the legal profession than college-educated white males with above-average salaries. *1992 ABA Poll* at 61. More than half the African-Americans and Hispanics surveyed (56 percent) expressed favorable views of lawyers. Twice as many women had favorable views (47 percent) than had negative views (26 percent). *Id.* at 61, 63. And those who received most of their information from television had more favorable attitudes towards lawyers (46 percent) than those who received most of their information from newspapers (32 percent). *Id.*[15] At least one commentator has suggested that one

[14] Lawyers again rated below most professionals, but above stockbrokers and politicians. Overall, 40 percent of those polled had a favorable view of the profession, 36 percent were negative, and 26 percent were undecided. *Id.* at 61-62.

[15] The *National Law Journal* poll yielded similar results. More than half of the African-American respondents had a positive view of the legal profession; but only 26 percent of white respondents did. More women (33 percent) had a positive view of attorneys

of the factors in the current anti-lawyer sentiment is a backlash against the use of the legal system to enforce and expand the rights of society's less privileged and the role of "lawyers as agents of equalizing change in society." *NLJ Survey* (quoting Professor Marc Galanter, University of Wisconsin Law School).

2. *The proposed rule of law.*

Even if the Florida Bar were correct that attorney advertising has affected the profession's current reputation, that fact would lack constitutional significance. This Court has never held that the state has a sufficient interest in the *image* of a profession to suppress the profession's right to speak or the public's right to listen. *See Bates,* 433 U.S. 368-69 (expressing disbelief that advertising alone was capable of diminishing a profession's reputation in the community, but invalidating the restriction at issue because it was not necessary to prevent erosion of professional *behavior*); *Edenfield,* 113 S. Ct. 1800 (expressing skepticism that a state could have a constitutionally cognizable interest in restricting advertising for the purpose of enhancing the image of accountants).

The Florida Bar confuses its very significant interest in ensuring that its members are worthy of the community's respect with a chimerical interest in shielding the public from information that might lead it to form a less flattering impression. Because there are no facts suggesting that attorney advertising has caused Florida attorneys to violate their obligation to serve their clients and the public, "no change in [*Bates*'s] factual underpinning has left its [] holding obsolete." *Casey,* 112 S. Ct. at 2812. Thus, the second *Casey* factor also weighs decidedly in favor of *stare decisis.*

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than men (24 percent). And negative views of attorneys were far more prevalent in more comfortable economic brackets (47 percent of respondents earning between $50,000 and $75,000 per year) than among the very poor (only 27 percent of those earning less than $20,000 per year). *NLJ Survey.*

III. THE RULES ANNOUNCED IN *BATES* AND ITS PROGENY HAVE PROVED WORKABLE AND HAVE BEEN HEAVILY RELIED ON.

A. There Is No Showing That States Have Been Unable To Police Constitutional Restrictions On Attorney Advertising.

The Florida Bar has not alleged that it is unable to police constitutional restrictions on attorney advertising. No evidence has been submitted of any bar having difficulty enforcing such restrictions, nor has any explanation been offered why state bars would have greater difficulty policing the restrictions the Court has permitted than the restrictions the Court has invalidated.[16] Indeed, there is no evidence that there has even been any significant violation of constitutional restrictions on attorney advertising. Because advertising is by definition an activity occurring in public, and effective only when it is highly visible, violations would not be expected to elude discovery. Competitors, as well as consumers, have a strong interest in policing miscreants. Yet there is no evidence that bar associations have even received a significant number of complaints about individual advertisements, much less that they have been unable to deal effectively with any received.[17]

Further, the fact that courts have been involved in reviewing a continuing procession of new state restrictions under the rules announced in *Bates* and its progeny

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[16] *Amici* Alabama State Bar Association, *et al.,* claim in their two-page brief that ensuring truthful price advertising remains a serious enforcement problem. Ala. Br. 3. Nonetheless, despite the many bar associations joining it, the brief does not include a single piece of even anecdotal evidence to support this bare allegation.

[17] In Massachusetts, for example, the Board of Bar Overseers received 2,200 grievance filings last year; only 1 percent were related to any type of lawyer advertising or solicitation. Claire Rattigan, "Overseers Not After Lawyer Ads," 22 *Massachusetts Lawyers Weekly* 1777 (May 9, 1994).

does not in any way suggest that the rules are unworkable. *See Casey*, 112 S. Ct. at 2809. As in *Casey*, the rule announced in *Bates* is "a simple limitation beyond which a state law is unenforceable." *Id.* And like the rule at issue in *Casey*, the *Bates* rule has not proved unworkable because, although it has "required judicial assessment of state laws affecting" the rights involved, "the required determinations fall within judicial competence." *Id.* Thus, the third *Casey* factor also weighs in favor of *stare decisis*.

B. Many Commercial Arrangements Have Been Based On This Court's Attorney Advertising Decisions.

Attorney advertising presents the "classic case for weighing reliance heavily in favor of following the earlier rule" because it involves "the commercial context, where advance planning of great precision is most obviously a necessity." *Casey*, 112 S. Ct. at 2809. (Citation omitted). Attorneys have organized law practices in reliance on advertising to attract clients. This has affected how they have organized their personal lives, how and whether they have chosen to establish an independent practice, and even what type of practice they have chosen to develop. Advertising, for example, provides a means of generating much greater volume than other methods of attracting clients, which has permitted some firms to establish the type of practice that can serve traditionally underserved middle class families.[18]

In addition, specialized advertising agencies have been organized to provide advertising services to lawyers [19] and

[18] Law firms have also relied on other business development methods—such as newsletters, seminars, press releases, letters to non-clients following up on a conversation at a public meeting, etc.—that would be precluded by some advertising restrictions bar associations have adopted or considered.

[19] For example, California-based R.W. Lynch Co. has specialized in providing group advertising to attorneys for ten years, and now provides group advertising in 45 states.

the various media that have carried attorney advertising have relied on the expected income from attorney advertising in shaping their businesses.[20] Reversing directions now, after 17 years of commercial reliance, would work a special hardship on all these enterprises. Thus, the final *Casey* factor also weighs in favor of *stare decisis*.

* * * *

There have been lawyers and bar associations, since *Bates* was before this Court, anxious to ban or severely restrict attorney advertising because, at least in part, they found it embarrassing. The attorney advertising made possible by *Bates* has little role in the elite practice of large law firms and prestigious specialists and would not be missed by them. But its role remains vital to the delivery of legal services to the poor, the less educated, the young, and even individuals of average means. Nothing has changed since *Bates* was decided that would justify changing direction. Indeed, all the evidence, and the considerable reliance on *Bates* in the structuring of new types of practice, makes clear that *Bates* was correctly decided in 1977 and is still needed today.

[20] Local television stations, for example, received $125 million in advertising receipts from legal services advertising in 1993. (Data supplied by Arbitron's MediaWatch Service covering the top 75 markets and compiled by Television Bureau of Advertising).

CONCLUSION

Amici urge this Court to reject the Florida Bar's invitation to overrule Bates and the many cases that have followed it.

Respectfully submitted,

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